In Limine Motions and Admitting Child Abuse Reports into Evidence

By Vesselin Mitev

Trial on all issues, including custody, is days away. You open up the mailbox and waiting for you is a manila envelope from your adversary (too thin to be belated discovery but too thick to be a settlement offer). Rolling your eyes, and gently cursing under your breath, you open up the package and see you have been served with a motion *in limine* to preclude certain evidence and testimony, specifically relating to the issue of whether or not an "indicated" report made during the course of the proceedings to the state central register for child abuse and maltreatment (SCR) should be admissible as evidence in the custody portion of the case.

An "indicated" report means that there is some credible evidence that a report of child abuse/maltreatment is true. Indicated reports are kept at SCR until the youngest child named in said report is 28 years old, and some employers, e.g., child care providers, welfare agencies, schools, may and often are notified of the reports. "Unfounded" — no believable evidence of truth — reports are still kept at the SCR but are sealed and expunged within 10 years after the case was opened.

The internal mechanisms of the SCR involve administrative procedures for changing an "indicated" or "substantiated" report to "unfounded," which for all intents and purposes culminate with an administrative hearing (assuming the initial request to amend/expunge is denied) and then an Article 78 proceeding in State Supreme Court following an unsuccessful hearing. In short, it can be many months before an "indicated" report winds its way through the system and ends up, potentially, unfounded.

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Your adversary, via her motion, presents a compelling case: her client has been indicated; denies all the claims in the indicated report; has not yet exhausted her administrative remedies and, although the administrative hearing was not in her favor, has timely commenced an Article 78 review of the decision, which has not yet been determined. Thus, she argues, her client would be unduly, irreparably prejudiced, if the SCR report and the underlying file are admitted into evidence at the custody hearing, since her client has, potentially, a chance to clear her name at the end of all of this.

Compelling as the case may be, the law holds otherwise. First, Domestic Relations Law 240 (a-1)(1) provides that prior to issuing any "permanent or initial temporary order of custody or visitation," the court "shall conduct a review of the decisions and reports" made in "related decisions in court proceedings initiated pursuant to article ten of the family court act" (3(i)) and (3(ii)): "reports of the statewide computerized registry" regarding orders of protection; the sex offender registry; and, under DRL 240 (1-a), "a report made to the statewide central register of child abuse and maltreatment … or a portion thereof, which is otherwise admissible as a business record … shall not be admissible in evidence … unless an investigation of such report … has determined that there is some credible evidence of the alleged abuse or maltreatment and that the subject of the report has been notified that the report is indicated ... If such a report, or portion thereof, is admissible in evidence but is uncorroborated, it shall not be sufficient to make a fact finding of abuse or maltreatment in such proceeding. Any other evidence tending to support the reliability of such report shall be sufficient corroboration."

In other words, prior to issuing a custody order, the legislative schema requires the custody court to review all applicable reports and orders, including an indicated child abuse/maltreatment report, which is properly admissible under the business records exception to the hearsay rule, codified under CPLR 4518, so long as the report is a) indicated and b) the subject of the report has been notified of said indication.

Falling squarely in the category of "careful what you wish for," the subject of the report seeking expungement could end up with some of the findings of the report deleted, but not the ultimate conclusion. In that case, the deleted findings would be inadmissible but the intact findings would be properly admitted. Conversely, should there be new findings, these additional and possibly unfavorable findings will be added to the report and would be properly admissible at trial, subject to the proper authentication required by CPLR 4518.

There is no articulable statutory authority for the "sufficient corroboration" prong of the statute, but the general consensus is that it stands to guard against the relatively low evidentiary threshold of what is essentially self-corroboration, where, for example the generator of the report is one of the parties to the matrimonial action. In such a case, even if the party is the sole source of the report, sufficient corroboration would be established via said party's testimony as to the events leading up to the making of the report, as long as said testimony is credible (despite the argument to the contrary) since the corroboration element goes to the reliability of the report, which is indivisible from the credibility of the source in a single-source report.

Thus, while a clever opening move at first blush, the *in limine* motion should be properly denied. There is no statutory authority preventing an indicated report and attendant case file from going into evidence at a custody hearing; in fact, the statutory explicitly contemplates their consideration by the court prior to making a custody determination.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 percent devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.